IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 56 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME-TAX - Applicant(s)
Versus
JINDAS PANCHAND GANDHI - Respondent(s)

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Appearance :
MR KM PARIKH for Applicant(s) : 1,
NOTICE SERVED for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 14/09/2005
ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 The following question has been referred by the Income Tax Appellate Tribunal, Ahmedabad Bench 'A' under Section 256(1) of the Income Tax Act,1961 (the Act) at the instance of the Commissioner of Income Tax, Baroda.

> “Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the capital gains arising out of the sale of the flat in Venus Apartments was long term capital gains and thereby the assessee was entitled to deduction from such gains as per law”.

2 The Assessment Year is 1985-86 and the relevant accounting period is S.Y.2040. The assessee, an individual, became a member in Venus Apartments (Galaxy Co-operative Housing Society). He was allotted flat No.G.8 in the building of the society known as Galaxy Bungalow vide resolution No.5 dated 04.11.1980 passed by the Managing Committee of the

Society. The assessee paid the purchase price of the property in installments as follows :

Amount(Rs)	Date
5,025	11.10.1980
50,000	19.03.1981
25,000	29.07.1981
200	15.11.1981
50,000	21.07.1982
25,000	11.10.1982

On the date of allotment i.e. 04.11.1980 the property was under construction and came to be completed on 12.09.1983. Physical possession was handed over to the assessee on 12.09.1983.

3 On 30.04.1984 the flat was sold by the assessee for a consideration of Rs.3,75,000/-. The assessee worked out long term capital gains at Rs.1,59,395/-. The Assessing Officer did not accept the stand of the assessee that the assessee had become owner of the property as per resolution dated 04.11.1980. According to the Assessing Officer the assessee had held the property for a period of less than 36 months and as such was liable to short term capital gains tax. The assessee carried the matter in appeal before the CIT(Appeals) who upheld the assessment on this

count.

4 When the matter went before the Tribunal in Second Appeal it was held by the Tribunal vide order dated 19.03.1993 that the assessee acquired the capital asset at the time when allotment was made and the price was agreed upon between the parties. The payment of price subsequently by way of instalment was in relation to the capital asset already acquired for the price already agreed upon. That a capital asset would consist of bundle of rights and hence according to Tribunal the assessee was rightly liable to tax on the surplus under the head long term capital gains.

5 Mr.M.R.Bhatt, learned Standing Counsel appearing on behalf of applicant-revenue has very fairly invited attention to the decision of this Court rendered in case of Commissioner of Income Tax Vs. Anilaben Upendra Shah, (2003) 262 ITR 657. Though served there is no appearance on behalf of the respondent-assessee.

6 In the aforesaid decision in case of CIT Vs. Anilaben Upendra Shah (supra) this Court has held :

> “It is thus clear that the member of a co-operative housing society only owns the shares in that society. The right to enjoy, or derive from, any land or building belonging to the co-operative housing society is merely an incidental right flowing from the ownership of the shares. A member of a co-operative housing society cannot sell all his shares in a co-operative housing society and still retain any interest in any property, whether land or building, belonging to a co-operative housing society and allotted/let out to the member. Similarly, a member of a co-operative housing society to whom a flat or land is allotted cannot transfer such land or building without selling

> the shares held by him. Hence, when the question comes up for consideration as to which is the relevant date, while computing the capital gain tax in case of transfer of his shares by a person who is a member in a co-operating housing society, the relevant date would be the date on which the member acquires the shares in the co-operative housing society and the date on which the member had sold his shares in the said co-operative housing society".

7 The controversy before the Court was in relation to the benefit u/s.80T of the Act. In almost similar situation the Court was called upon to decide whether the assessee had held the capital asset for a period of more than 36 months. Therein the assessee was allotted a flat by a Co-operative Housing Society by way of allotment of shares on 15.11.1979. The possession of the flat was delivered in October,1981. The shares were transferred on

4.12.1982. It was in this context that the controversy was brought before this Court wherein revenue had raised identical contentions about the capital asset having been held for a period of less than 36 months. The said submission was not accepted by this Court in light of the ratio reproduced hereinbefore.

8 Applying the ratio of the aforesaid decision to the facts of the case, it is apparent that the assessee in the present case was allotted share by the Co-operative Housing Society on 04.11.1980 and the sale of the same took place on 30.4.1984 i.e., after a period of 36 months. The assessee was therefore justified in treating surplus consideration as long term capital gains. The Tribunal was therefore justified in holding that the capital gains so arising was long term capital gains and the assessee was entitled to deduction from such gains as per law.

9.The question is therefore answered in the

affirmative i.e., in favour of the assessee and against the revenue. The Reference stands disposed of accordingly. There shall be no order as to costs.

(D.A.Mehta, J) (H.N.Devani, J)

m.m.bhatt